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No. 89-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

C. D. DI GIAMBATTISTA, Petitioner

v.

JEREMIAH J. SULLIVAN AND REGISTRAR OF DEEDS,
MIDDLESEX COUNTY, SOUTH DISTRICT,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

In 1973 a three-judge federal court for Massachusetts enjoined future ex parte attachments of real estate without prior notice and hearing; and effective July 1, 1974 the state legislature made alterations which in practice eliminate the requirement of prior notice through a legislative act, Section 85, Chapter 1114 (1973), which explicitly equates ex parte attachment with warrantless arrest.

In May 1987 a state probate judge issued an ex parte attachment for $75,000 against the whole of petitioner's beneficiary share without prior notice and hearing, upon the impeachable affidavit as to probable cause, without specific fact, by a convicted felon which the judge knew to be untrue and in violation of state law. A second encumbrance for $39,000 by the judge was annulled by the state appeals court as without jurisdiction.

QUESTIONS PRESENTED

When the federal district court dismissed petitioner's request for injunctive relief and complaint under 42 U.S.C. §§1983, 1988, denied leave to amend and dismissed without reasons, and the First Circuit affirmed for "inherent defects of jurisdiction," the questions presented are:

1. Did the federal district court have jurisdiction when petitioner's claims are against individual defendants using color of state law, and he seeks nothing from the state?

2. As Massachusetts provisions for ex parte attachment albeit unconstitutional have been well settled since 1974, and the state appeals court has twice pretermitted petitioner's appeals without deciding, does the Eleventh Amendment bar federal jurisdiction as defendants claim?

LIST OF PARTIES

The parties to the proceedings below were the petitioner C. D. Di Giambattista and the respondents Honorable Jeremiah J. Sullivan as he was a judge of the Middlesex County, Massachusetts, Probate Court, and John F. Zamparelli, as he was Register of Deeds for Middlesex County, South.

The successor in office by election, and the present Register of Deeds, Middlesex County, South, is Eugene C. Brune.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner C. D. Di Giambattista respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on February 2, 1989, and the order denying petition for rehearing entered on March 28, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit has not been reported. It is reprinted in the appendix hereto, p. 1a below.

The memorandum decision of the Court of Appeals for the First Circuit denying rehearing is reprinted in the appendix hereto at p. 18a below.

The decision of the United States District Court for Massachusetts (Nelson, D.J.) dismissing the complaint and denying leave to amend was by endorsement without written opinion or memorandum.

JURISDICTION

Petitioner brought this action in the United States District Court for Massachusetts on October 20, 1987, invoking federal jurisdiction under 28 USC § 1331, as for more than thirty years he had been a resident of Texas; and for violation of his constitutional right to due process he invoked jurisdiction under 42 USC §§1983, 1988 and the Fourteenth Amendment. See **p. 20a** below.

On April 26, 1988 the district court entered judgment for the defendants upon allowance of defendants' motion to dismiss. No petition for rehearing was made by plaintiff. **P. 16a.**

On February 2, 1989 the Court of Appeals for the First Circuit entered judgment affirming the dismissal below, and on March 28, 1989 denied plaintiff's petition for rehearing. See **p. 17a** and **p. 18a** below.

Petitioner invokes under 28 USC § 1254 (1) the jurisdiction of this Court to review the judgment of the First Circuit.

STATUTE INVOLVED

In relevant part the statute involved is as follows:

> 28 USC § 1254. Courts of Appeals; Certiorari;
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE CASE

In 1973 the United States District Court for Massachusetts had enjoined future ex parte attachment of real estate without prior notice and hearing. In May 1987 a state probate judge issued, without prior notice or hearing, an ex parte attachment of real estate against petitioner in the amount of $75,000 or the whole of his beneficiary share in his mother's estate. The attachment was granted effectively to an attorney convicted and sentenced for armed bank robbery and upon his affidavit, a fact material to the Massachusetts state provisions for attachment as revised after 1973, the attorney's testimony being impeachable under state law until December 1994.

When the same probate judge within days issued a second order in favor of other

attorneys which encumbered the same beneficiary share of petitioner, petitioner appealed to the state appeals court, which annulled the order as given without jurisdiction.

Petitioner twice appealed to the state appeals court for vacatur of the ex parte attachment, and the appeals court pretermitted a decision, referring the petitioner to the ordinary state procedure in appeal from probate for relief from violation of his constitutional rights. See **p. 25a** below.

Petitioner demurred. As executor before removal by the probate judge, he had been arrested at the behest of the convicted attorney and acquitted by a jury, but the false arrest was introduced into the probate proceedings. As to the ex parte attachment granted without notice and hearing, petitioner filed in United States District

Court a complaint against the probate judge under 42 USC §1983, §1988 seeking injunctive relief and costs against further such writs pending adjudication of his right to due process. A county registrar of deeds responsible for recording the attachment and thereby giving it force and effect, was named as a necessary and ancillary co-defendant with the probate judge.

Neither the defendant judge nor the registrar filed answers to the complaint. In under sixty days petitioner requested leave of the federal district court to amend his complaint as to the second violation, found by the state appeals court, in that the probate judge had entered a second encumbrance in want of jurisdiction, therefore without probable cause and, on the facts, in full knowledge of want of probable cause. As attested by court records and transcript,

petitioner in accordance with orders of the probate judge had transferred control of all estate assets to the court appointed administrator pending appeal of probate issues to the state appeals court. See **pp. 31a-33a.**

The United States District Court for Massachusetts, David S. Nelson, J., denied the petitioner leave to amend his complaint and dismissed the complaint on motion of the defendants comprising a laundry list of grounds for dismissal, but without choosing any or supplying a written opinion. The Court had complained bitterly, however, of an unwanted addition to its caseload.

The United States Court of Appeals for the First Circuit affirmed the court below in a six-page opinion of February 2, 1989 rightly not intended for publication. If to the private eye the errors of fact are

numerous [documentary evidence for the transfer of $30,000 is not easily overlooked in exhibits twice presented], to the trained legal eye the errors of law are glaring [contrary to the First Circuit opinion, the Supreme Court has held expicitly that §1983 of 42 USC is an exception to the anti-injunction act, 28 USC §2283], p. 8a.

The position of the First Circuit in affirming the dismissal and denial of leave to amend by the district court appears to be at core that [p. 8a below]:

> "Here, although appellant alleges that he was deprived of constitutional rights without due process of law, it is obvious from his requests for relief that he seeks review of the particular state proceedings in which he was involved."

In correction, petitioner moved for rehearing, contending that as executor he had arrived from Texas to face the Augean task of cleaning Massachusetts' stables merely to administer an ordinary will. On March 28, 1989 the First Circuit denied rehearing. For the first time the court gave concrete reasons for the dismissal below. This order of the First Circuit reads in full:

> "The petition for rehearing is denied. We only note in this context that appellant's motion to amend would not have cured the jurisdictional defects inherent in his complaint. We also deny appellant's motion in derogation of costs." **P. 18a** below.

From the First Circuit's previously published opinions it is apparent that the implicit reference is to its mistaken interpretation of Pennhurst State School & Hospital v.

Halderman, 465 U.S. 89 (1984). Petitioner thereupon moved for recall of the First Circuit's mandate, stating [p. 29a below]:

> "... appellant believes that another district court would have taken jurisdiction, the 'inherent defect' herein being resistance to caseload."

The First Circuit denied petitioner's motion for recall of its mandate on April 21, 1989.

Petitioner argues below that because of error or oversight, the First Circuit fails in general to apply the jurisdictional prescriptions of the Supreme Court which stem from Pennhurst and are widely followed in other circuits.

REASONS FOR GRANTING THE PETITION

I

Where the federal district court was silent, the First Circuit supplied an insufficient reason for denial of leave to amend, and dismissal, of a complaint under 42 U.S.C. §§ 1983, 1988 which sought injunctive relief against repeated deprivations of rights in real property, an inheritance, by state officials acting under color of state law, (1) by ex parte attachment without prior notice and (2) in want of jurisdiction, as had been determined by the state appeals court.

The only reason for dismissal specifically expressed by the federal district court was aversion to additional caseload. Such dismissal and affirmation of dismissal run counter to literally hundreds of cases under § 1983, most of them less well founded.

The only claims presented in this petition, if allowed reinstatement and amendment, are those seeking injunctive relief, costs and compensatory damages from two state probate judges who gave and affirmed ex parte attachment of petitioner's real property without prior notice and hearing and in knowing absence of probable cause. The defendant

registrar of deeds, a necessary ancillary to relief, would be enjoined only to erase the recordation of attachment if petitioner's case against the state judges is proven.

These claims have never been presented to or adjudicated by a state court. They were dismissed by the United States District Court for Massachusetts, David S. Nelson, J. Dismissal was affirmed by the First Circuit on February 2, 1989 and rehearing denied for 'inherent defect of jurisdiction' on March 28, 1989.

While the district court gave no reasons of law for dismissal and for denial of leave to amend pursuant to 15(a) F.R.C.P., the defendants,without entering answers to the petitioner's complaint,argued principally, in a 96-page motion to dismiss that either the petitioner failed to state a claim upon

which relief could be granted, 12(b)(6) F.R.C.P., or that the Rooker-Feldman principle deprives a federal court of jurisdiction in state cases involving the encumbrance of real property.

Upon improved knowledge, and on being allowed leave to amend, the petitioner, who is not trained in the law, might have presented a complaint bettered by redrafting. The original complaint is contained within the present record appendix at **pp. 20a-28a.**

Its principal defect is a harmless redundancy. The first prayer of the original reads at **p. 26a**:

> "1. That this Court order the ex parte writ of attachment annulled, dissolved and vacated."

There was no need to so "order," a nuance on which the defendants gleefully fastened as a proposed violation of the Eleventh Amendment. At the moment of granting and affirming the

ex parte attachment in May 1987, the two state probate judges became ultra vires a prospective injunction against ex parte attachment without prior notice and hearing entered by the United States District Court for Massachusetts fourteen years earlier, and the present court had but to grant declarative relief rather than an order. Bay State Harness Horse Racing and Breeding Association, Inc. v. P.P.G. Industries, Inc. et al, 365 F. Supp. 1299 (D.C. MA 1973). Moreover, there was no question whether the federal court was to award injunctive relief against state officials on the basis of state law, the case presented in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 91, 79 L. Ed. 2d. 67, 73, 104 S. Ct. 900, and below at **p. 21** below.

The question was, whether a federal court on the basis of federal law had power to

grant declarative and injunctive relief against individuals in repeated violation of the petitioner's constitutional rights while acting under color of state law. The federal district court, Nelson, J., did have such power by virtue of the long-standing federal injunction, and he refused relief.

Otherwise, petitioner's original petition is sound and sufficient on its face, and would be unusually persuasive if allowed amendment and reinstatement. Not only had the two probate judges issued or affirmed an ex parte attachment of $75,000, more than the whole of its value, against the petitioner's beneficiary share without prior notice and hearing and in disregard of the longstanding federal injunctive. Barred by denial of leave to amend, the petitioner was prevented from stating as

part of his complaint that the first probate judge, in the course of his societal mission to redistribute beneficiary shares to lawyers, had also ordered a stay of distribution to the petitioner until he consented to arbitration in demands for $39,000 in attorney fees. This second order was overturned by the state appeals court on June 18, 1987 as given in want of jurisdiction. In everything, moreover, the probate judges had acted either in personal knowledge of absent probable cause, or by acceptence of affidavits by the attorney, a convicted felon, whose credibility was impeached under state statute until December 1994.

Petitioner had ample ground to amend his complaint in federal court to include these further violations of substantive due proce
But amendment was denied, and denial affirm

Leave to amend pleadings under 15(a) F.R.C.P. should be freely given where the underlying facts relied upon by a plaintiff may be a proper subject of relief, and he ought to be afforded an opportunity to test his claim on the merit. Outright refusal to grant leave to amend, without a justifying reason, is not an exercise of discretion but an abuse of it, and is inconsistent with the spirit of the federal rules. Foman v. Davis, 371 U.S. 178, 9 L. Ed. 222, 226, 83 S. Ct. 227 (1962).

Dismissal of the petitioner's § 1983, 1988 complaint was most unusual, a thumb in the eye of justice which only this Court can now remove. The Supreme Court has held previously that Congress intended § 1983 to be an independent protection for federal rights and did not intend to insulate state judges completely from federal

collateral review. Pulliam v. Allen and Nicholson, 466 U. S. 522, 541, 80 L. Ed. 2d. 565, 104 S. Ct. 1970 (1984).

The circuits have widely followed the rule established in Conley v. Gibson, 78 S. Ct. 99 (1957) that a complaint should not be dismissed for failure to state a claim unless the plaintiff could state no set of facts which would entitle him to relief. This standard has long been a staple of federal practice and is supported by literally hundreds of cases. Elliott v. Perez, 751 F. 2d. 1472, 1479 n. 17 (Fifth Cir. 1985).

But not so here.

REASONS FOR GRANTING THE PETITION

II

The justification supplied by the First Circuit, that 'inherent jurisdictional defects' confine all or parts of the petitioner's claim to the state courts, ignores (1) that the state appeals court has twice pretermitted petitioner's appeals without deciding (2) that the defendant state officials acted ultra vires a federal injunction of fourteen years' standing against ex parte attachment (3) that the defendant state officials also violated state provisions for attachment albeit unconstitutional and therefore did not act by authority of the state and (4) that under §§ 1983, 1988 of 42 U.S.C., petitioner sought federal relief against the defendant state officials as individuals, but seeks nothing from the state.

Circuits other than the First Circuit have long followed the principle laid down by the Supreme Court in Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d. 662 (1974) which clearly permits a federal court to award prospective injunctive relief against state officials when the claim is based on federal law, e. g. Spruytte v. Walters, 753 F. 2d.498, 514 (Sixth Cir. 1985).

Pennhurst provides further clarification for the permissibility and reach of federal court injunctions where these do not require a state official to conform to state law and where such injunctions also do not entail expenditures from the state treasury or from federal funding provided to the state. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 79 L. Ed. 2d. 67, 104 S. Ct. 900 (1984).

The implied converse of Pennhurst is that where the existence is asserted of a federal right that requires vindication, the federal jurisdiction should always be upheld, whether the relief sought is retrospective or prospective. 96 Yale Law Rev. 1425, 1480 n. 224 (1987). But such an implication has escaped the First Circuit, which in its opinion herein

relies on the Anti Injunction statute, 28 U.S.C.S., § 2283, belonging to a former locomotive age. See **n. 1** at **p. 8a** below.

The principle had been settled even longer that the Eleventh Amendment would not prohibit a federal court from granting injunctive relief against a state official acting contrary to the United States Constitution, Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). This hardy early principle was explicitly recognized and saved in Pennhurst, 465 U. S., 105-106 and 109 n. 17.

In the present case petitioner sought injunctive relief on the Young principle in the federal courts from the virtually undisguised peculation of the defendant

probate judge when he repeatedly deprived the petitioner of property rights without prior notice and hearing, in knowing absence of any probable cause, **pp. 31a-33a** below, and in wanton absence of jurisdiction as determined by a state appeals court. Yet these facts and these violations did not suffice to engage the interest of both levels of the federal courts in Massachusetts. See **p. 39.**

Petitioner's request for injunctive relief kept well within the narrow exception to the sovereign immunity doctrine first carved out in 1908 by Ex Parte Young permitting federal courts to enjoin state officials to conform to federal law, **p. 27a, ¶ 3.** It also complied with Pennhurst, since acceptance of his complaint would have had no impact whatever on the state's treasury or federal funding, nor

did he make the state a defendant in his application for injunctive relief. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 87 L. Ed. 2d. 171, 105 S. Ct. 3142 (1985). Injunctive relief, costs and compensatory damages were sought only against one state official individually in the original complaint, and against two if amended, but nothing from the state.

In dismissing without giving reasons, the federal district court also countenanced, but did not rule on, another groundless defense. This was that in the particular subject matter of a state's attachment provisions, the so-named Rooker-Feldman principle prohibits federal jurisdiction; or in other words that the original Young exception to the sovereign immunity doctrine did not carve out so much.

This astonishing view may be termed a Van Winkle lapse which takes no account of the long line of cases since Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d. 556 (1972), and finds emphatic rejection by the Supreme Court. In general, to relegate a §1983 claimant to a state court by applying the Rooker-Feldman theory would ignore Congress's purpose in adopting that statute. Section 1983 was intended to provide dual or concurrent forums in the state and federal ~~systems~~, enabling the plaintiff to choose the forum in which to seek relief. Patsy v. Florida Board of Regents, 457 U. S. 496, 506, 102 S. Ct. 2257, 2263, 73 L. Ed. 2d. 172 (1982).

But in particular:

> "...I do not believe that the so-called Rooker-Feldman doctrine deprives the Court of jurisdiction to decide [a] challenge to the constitutionality of [a state's] stay and lien provisions... I see no juris-

> dictional bar to the Court's decision in this case."
> Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1529-30, 95 L. Ed. 2d. 1, 481 U. S. 1 (1987), Scalia, J., in concurring opinion.

Yet, sub silentio, the First Circuit has accepted such a bar to this petitioner's complaint and efforts to amend it.

An exquisite point in the defendants' argument seeks to avoid individual liability by involving the state in ways which would bar jurisdiction, as examined above, yet without naming the state a third-party defendant. But the state, if at fault for having long-ago "settled" its provisions for attachment in a form that remains unconstitutional, did not authorize the defendants to make elementary breeches in state requirements for plaintiff affidavits under Rules 4.1(f)(iii) and 4.1(h) M.R.C.P. Rule 4.1(f)(iii) requires that a motion for

ex parte attachment meet the requirements of Rule 11, M.R.C.P., the most abused in Massachusetts; and Rule 4.1(h) M.R.C.P. provides in full:

> "Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that he believes this information

The defendant state officials conspicuously violated these state requirements. The specific facts are those set out in pp. 31a-33a and will not support an affidavit. The affiant, one Richard H. Liebman, is an attorney reinstated after conviction and imprisonment for conspiracy in the robbery of a bank.

Unconstitutional acts taken without state authority come within the color of state law. Monroe v. Pape, 365 U.S. 167, 187 (1961). Cf. Spruytte, p. 19 above, at 514.

REASONS FOR GRANTING THE PETITION

III

Following the prospective injunction against further ex parte attachment in Massachusetts entered by the federal court in 1973, the state made numerous alterations in compliance efective July 1, 1974. The state provisions being well settled, petitioner properly invokes the federal jurisdiction against state officials as individuals for violations of constitutional protections of his rights in proper*y.

Following what appeared to be an epochal decision in Bay State Harness Horse Racing and Breeding Association , Inc. v. P.P.G. Industries, Inc., 365 F. Supp. 1299 by the United States District Court for Massachusetts in 1973,striking down the state's free ways of issuing ex parte attachments, the legislature enacted extensive alterations purporting to conform state provisions to the federal requirements. These changes were enacted in Sections 83-130, Chap. 1114 of the Legislative Acts of 1973.

In truth much was altered but little was changed. The arbitrary and accusative intention of ex parte attachment remained, as is seen in the equating of ex parte attachment with arrest prescribed by the new authority of Section 85 of Chapter 1114 as just enacted in 1973:

> "At any time during the pendency of an action in the district court, upon the commencement of which an arrest or attachment is authorized by law, the court for cause may, on motion ex parte, order such arrest of the defendant or such attachment of his property by trustee process or otherwise to secure the judgment or decree which the plaintiff **MAY OBTAIN** in said cause; [emphasis supplied].....Such arrest or attachment shall be subject to all the provisions of law relative to arrest and attachment upon mesne process, so far as applicable."

A clearer expression of a legislative intent which is unconstitutional, could not be shown. Yet this is the present basis of state provision for property attachment as embodied in M.G.L. c. 223 and in Rule 4.1 M.R.C.P.

Reinstatement of the ellipsis above serves to remove all doubt that due process by prior notice and hearing is ignored. The ellipsis restored in full reads:

> "...but no arrest of the defendant shall be authorized unless the same facts as are required to be proved to authorize an arrest on mesne process are proved to the satisfaction of the court by affidavit as provided in section two of chapter 224. Except in Suffolk county, a clerk of such court may, under the same conditions, order such attachment of the property of the defendant...."

These provisions took effect July 1, 1974, after the decision and prospective injunction in Bay State Harness Horse, above.

In this spirit, the two substantive changes made to conform state provisions for real estate to the injunction, were cosmetic. In a practical sense, they diminished the standing of real property to that of consumer goods sought by replevin.

Before the federal injunction, real estate unlike personal property could be attached without an order of the court. Old Rule 4.1 M.R.C.P. The legislative alterations made on the heels of the injunction conformed the attachment requirements with those for consumer goods by requiring a court order to attach real estate as well - a leg up for the state's middle class.

But the legislature took away with the other hand. Whereas before, real estate had to be attached within thirty days of commencement of an action, now attachments could be made at any time thereafter, albeit requiring an order of the court.

The net effect, given the state courts' continued prodigality in approving attachments virtually on request, was to reduce real estate to the order and vulnerability of consumer goods sought back in replevin.

These two substantive levelling changes aside, which equate real estate with consumer goods, the legislative alterations made do not provide for prior notice and hearing in either category.

The Massachusetts court rules of procedure do, but the requirement is buried in a sub-paragraph of Rule 4.1(c) M.R.C.P., "Service," where it is effectively countermanded by reference to subdivision (f) facilitating waiver of prior notice and hearing in the routine manner envisioned by the legislature in Legislative Acts 1973, Chapter 1114, Section 85 as given above. The relevant part of Rule 4.1(c) M.R.C.P. reads:

> "... Except as provided in subdivision (f) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is reasonable likelihood that the plaintiff will recover judgment..."

But subdivision (f) of Rule 4.1 M.R.C.P. breathes the accusative spirit of Section 85, Chapter 1114 of the Legislative Acts of 1973. It forecloses prior notice and hearing and dwells on the freedom of a plaintiff to allege intended flight or concealment in ex parte hearing in absence of the defendant:

> "An order approving attachment ... may be entered ex parte...[upon allegation] that...(ii) there is a clear danger that the defendant if notified in advance... will convey [the property], remove it from the state or will conceal it, or (iii) there is immediate danger that the defendant will damage or destroy the property to be attached."

The absence of requirement for prior notice and for presence of the defendant under this well-settled law is conspicuous. No federal court need wait for a definitive construction of the state statute by a state court. The constitutional offense could not be more explicit. Contrast Railroad Commission of Texas v. Pullman Co., 312 U. S.

496, 498 (1941). The constitutional issue was settled by a federal court in 1973 and state law settled by legislative enactment later that same year, while the Massachusetts appeals court has twice heard appeals from the petitioner and has pretermitted without deciding in 1987 and 1988. See **p. 25a** below.

There is no possibility that a federal court in Massachusetts, asked to decide this issue and grant injunctive relief, would thereby make a tentative answer which may be displaced tomorrow by a state adjudication, id. at 312 U.S. 500, for the same reason.

The Supreme Court is not hereby requested by this petitioner, nor were the federal courts below, to anticipate a question of constitutional law in advance of the necessity of deciding it, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347, 80 L. Ed. 688, 56 S. Ct. 466 (1936). The question on

the merits was decided prospectively by the federal injunction of 1973; only, the federal district court and the First Circuit of Appeals have declined to grant injunctive and declarative relief under the newer provisions of 42 U.S.C. §§1983, 1988.

The present action challenges the constitutionality of a state official's action and for that reason is not one against the state for which federal jurisdiction could be withheld, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102, 79 L. Ed. 2d. 67, 79, 104 S. Ct. 900 (1984), citing Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).

No pendent state claim is present here which might require the separate adjudication of a state court, or require further settling of law in a case bifurcatable between state and federal courts, since

petitioner neither asks a state official to conform to state law, nor the state for any relief; nor would the federal relief he seeks diminish the state treaury or state federal funding, Pennhurst, 465 U.S. at 120 in ways that would require further settling of law by the state courts.

In short, petitioner's claim raises no need of further settling of law by the state courts, and in other contexts the First Circuit Court of Appeals has found that most federal courts have refrained from abstention where the prerequisite of state law unclarity is not present. Cuesnongle v. Ramos, 835 F. 2d. 1486, 1498 (1987).

But not here.

CONCLUSION

Dismissal by the federal district court of a complaint seeking injunctive relief under 42 U.S.C.S., §§ 1983, 1988 from ex parte attachment of real estate without answers from defendants, without reasons except aversion to caseload, and denying timely leave to amend, was most unusual and is contrary to federal practice.

In affirming, the First Circuit Court of Appeals supplied 'inherent jurisdictional defect' as justification for the dismissal below but also imputed to petitioner a simple desire to avoid a state judgment.

The defendant state probate judges and county registrar of deeds acted ultra vires an injunction against ex parte attachment issued by a three-judge federal court fourteen years before.

CONCLUSION

As long ago, the Massachusetts legislature in response to the injunction had made alterations in state law to avoid prior notice. This is the only marginally constitutional question raised. Therefore state law was well settled when ex parte attachment against real estate of the petitioner issued, and the Eleventh Amendment does not bar federal jurisdiction.

Moreover, in a state probate-court system infused with peculation, defendants' Eleventh Amendement defenses are only grotesque, although adopted by the First Circuit.

The First Circuit also follows the federal district court in studiedly avoiding petitioner's arguments based on state requirements, Rule 4.1 (f),(h) M.R.C.P.,

for demonstration of specific fact in allowing ex parte attachment; and both federal courts have likewise avoided petitioner's uncontroverted evidence of absence of probable cause. See again **pp. 31a-33a** herein.

It follows that defendants also acted without the authority of the state and may not seek the protection of the Eleventh Amendment for this additional reason.

Thus where petitoner seeks relief, costs and compensatory damages from state officials but seeks nothing from the state, the Eleventh Amendment does not bar federal jurisdiction.

CONCLUSION

The Supreme Court should grant this petition for these reasons and grant certiorari to the First Circuit with remand for reinstatement of petitioner's amended complaint and reassignment to a different district judge.

Appropriate instructions should issue against the likelihood that in Massachusetts, political infusion of the state judicial system in favor of routine attachment and trustee process, in violation of constitutional rights, has affected parts of the federal judicial system as well.



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RECORD APPENDIX "A"

Opinion [Not for publication]

United States Court of Appeals

for the First Circuit

in

C. D. DI GIAMBATTISTA,

Plaintiff, Appellant

v.

JEREMIAH J. SULLIVAN, ET AL.

Defendants, Appellees

No. 88-1550

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Before

Campbell, C. J., Coffin and Selya, J.J.

Entered February 2, 1989

Per Curiam. Appellant, C. D. Di Giambattista, was the executor of his mother's estate and the trustee of an inter vivos trust. He was named as the respondent in two petitions to

remove him as fiduciary and in an equity complaint filed in the Middlesex Probate and Family Court by his brother and sister. Pursuant to these petitions, defendant, Judge Jeremiah J. Sullivan, removed appellant as executor of his mother's estate and as trustee of the trust.

On May 4, 1987, appellant's sister and brother, as two of the four heirs, moved for an ex parte writ of attachment against appellant's share of a house and real property in Everett owned jointly by the heirs. As part of their petition, they submitted an affidavit from their attorney which stated that appellant had, among other things, failed to pay to the court-appointed fiduciary $30,000 from his mother's estate, failed to pay rent and was in a fee dispute with his former

attorney who would seek to attach appellant's interest in the house.

Pursuant to Mass. R. Civ. P. 4.1 (f), Judge Sullivan issued an ex parte attachment in the amount of $75,000 against all of appellant's right, title and interest in the Everett property. The next day, the co-defendant, the Middlesex County Register of Deeds, accepted and recorded the attachment. Notice of the attachment was mailed to appellant.

On May 26, 1987, appellant moved to dissolve the writ of attachment alleging, inter alia, that the federal district court of Massachusetts, in 1973, had held that an ex parte writ of attachment was a deprivation of a constitutional liberty. This motion was heard and denied on May 29, 1987. Appellant subsequently petitioned a Single Justice of

the Massachusetts Appeals Court, pursuant to M.G.L.c. 231, §118, to dissolve the attachment. This was denied July 8, 1987. On August 3, 1987, appellant took an appeal to a full panel of the Appeals Court; this appeal still is pending. **[ERROR. C.D.D.]**

I.

Appellant filed suit in federal district court on October 20, 1987 against Judge Sullivan and the Middlesex County Register of Deeds. His complaint is based on 42 U.S.C. §1983. In it he alleges that he received no hearing prior to the issuance of the ex parte writ of attachment and that Judge Sullivan accepted the affidavit of an attorney who had been a convicted felon "whose testimony is impeachable" and who was "disobedient, untrustworthy and dishonorable before the court, and under the influence of drugs." Complaint, ¶9. There-

fore, appellant claims, he was deprived of constitutional rights without due process of law. Id. ¶10. He requested that the district court (1) order the ex parte writ of attachment annulled, vacated and dissolved; (2) order the Middlesex County Register of Deeds to strike the writ of attachment from the deed records; (3) order declarative and injunctive relief enjoining Judge Sullivan from issuing any further attachments "without due procedural process as required by federal law;" (4) order Judge Sullivan to pay appellant "exemplary damages commensurate with $75,000 ...and commensurate also with the defendant's willful and knowing misapplication of law while acting under color of a judiciary capacity."

Both defendants moved to dismiss appellant's

complaint, or in the alternative for summary judgment. Appellant moved to add another defendant, Judge Leahy, and to amend his complaint to add additional allegations against Judge Sullivan.

On April 21, 1988, the district court denied appellant's two motions and allowed, without opinion, both of defendants' motions to dismiss. Judgment entered on April 26, 1988. This appeal ensued.

II

It is well settled that federal district courts have no authority to review state court judgments if the relief requested is in the nature of appellate review. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). The proper court in which to obtain such review is the United States Supreme Court. 28 U.S.C. §1257; see Atlantic Coast

Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970) (lower courts may not sit in direct review of state courts). This rule applies even when the action in the district court involves constitutional challenges. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484-86 (1983).

Although appellant is correct when he states that a federal §1983 action is supplementary to a state remedy and that the state remedy need not be first exhausted before the federal one is invoked, see Monroe v. Pape, 365 U.S. 167, 183 (1961), it is equally clear that "[a] complaint under the Civil Rights Act does not provide the springboard for an unhappy state litigant to raise his federal claims de novo in federal court." P. I. Enterprises, Inc. v. Cataldo, 457 F. 2d. 1012, 1015 (1st Cir. 1972).

Here, although appellant alleges that he was deprived of constitutional rights without due process of law, it is obvious from his requests for relief that he seeks review of the particular state court proceedings in which he was involved.[1] As a result, the constitutional claims presented in this federal action are "inextricably intertwined" with the state court proceedings involving the writ of attachment. See Feldmen [sic.], 460 U.S. at 482 n. 16. Thus, appellant was, in essence, asking the district court to review the merits of the state court decision. See id. "This the district court may not do." Id. Appellant's

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1. We also note that the Anti Injunction Act generally prohibits federal courts from granting injunctions to stay proceedings in state courts. 28 U.S.C. §2283. This ban would apply to much of appellant's requested relief.

remedy is to pursue his appeal in state court and to petition the United States Supreme Court for a writ of certiorari. See Anderson v. Colorado, 793 F. 2d. 262, 264 (10th Cir. 1986) (where plaintiff sought review in federal court pursuant to § 1983 of specific state court custody decision involving plaintiff, his recourse was to exhaust state appellate remedies and petition for United States Supreme Court certiorari review); Hale v. Harney, 786 F. 2d. 688, 691 (5th Cir. 1986) (federal § 1983 attack on state divorce decree barred; state court errors were for correction in state court systems, "at the the head of which stands the United States Supreme Court").

The judgment of the district court is therefore affirmed.

RECORD APPENDIX "B"

Order

United States District Court

District of Massachusetts

in

C. D. DI GIAMBATTISTA,

Plaintiff

v.

JEREMIAH J. SULLIVAN, ET AL.,

Defendants

No. 87-2562-N

MOTION OF PLAINTIFF C. D. DI GIAMBATTISTA FOR LEAVE TO AMEND COMPLAINT

Pursuant to Rule 15(a) F.R.C.P., Plaintiff moves this Court for leave to amend his complaint in the following respects:

I. As to jurisdiction. By amendment, and pursuant also to § 1653 General Provisions, to invoke the jurisdiction of this Court under 28 U.S.C. § 1343(a)(3).

RECORD APPENDIX "B"

II. To add two counts against the defendant Jeremiah J. Sullivan as follows: (1) To constitute a Count I upon plaintiff's complaint as before, in the matter of ex parte attachment. (2) To add a Count II alleging deprivation of significant property rights under color of state law, while knowlingly acting without jurisdiction, as set out in ¶4 and ¶14 of plaintiff's memorandum herein. (3) To add a Count III alleging abuse of judicial power under color of state law, in bad faith and for an improper motive, as set out in ¶24 of plaintiff's memorandum herein.

~~Den~~ied. Donald S. Nelson, J.
April 21, 1988.

RECORD APPENDIX "C"

Order

United States District Court

District of Massachusetts

in

C. D. DI GIAMBATTISTA,

Plaintiff

v.

JEREMIAH J. SULLIVAN, ET AL.,

Defendants

No. 87-2562-N

MOTION OF PLAINTIFF C. D. DI GIAMBATTISTA FOR JOINDER OF PARTY DEFENDANT

Pursuant to Rule 19(a) F.R.C.P. and to Rule 21 F.R.C.P., Plaintiff C. D. Di Giambattista moves this Court for joinder of Vincent F. Lahey as party defendant in all respects relating to a Count I against the defendant Jeremiah J. Sullivan in the matter of ex parte attachment, for the reasons set out in ¶ 6 and ¶ 16 of plaintiff's memo-

randum herein; and in addition but separately in ¶7 therein.

Denied. David S. Nelson, J.

April 21, 1988.

RECORD APPENDIX "D"

Order

United States District Court

District of Massachusetts

in

C. D. DI GIAMBATTISTA,

Plaintiff

v.

JEREMIAH J. SULLIVAN, ET AL.,

Defendants

No. 87-2562-N

MOTION OF DEFENDANT JEREMIAH J. SULLIVAN TO DISMISS OR FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b), defendant Jeremiah J. Sullivan moves to dismiss the complaint filed by plaintiff C. D. Di Giam-

battista in the above titled action. In the alternative, defendant moves, pursuant to Fed. R. Civ. P. 56, for summary judgment.

The reasons for this motion are set forth in the accompanying memorandum.

Allowed. David S. Nelson, J.
April 21, 1988.

RECORD APPENDIX "E"

Order
United States District Court
District of Massachusetts
in
C. D. DI GIAMBATTISTA,
Plaintiff
v.
JEREMIAH J. SULLIVAN, ET AL.,
Defendants
No. 87-2562-N

RECORD APPENDIX "E"

MOTION OF DEFENDANT, REGISTRAR OF DEEDS MIDDLESEX COUNTY, TO DISMISS OR FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. (12)(b), defendant Middlesex County Registrar of Deeds, John Zamparelli, hereby moves to dismiss the complaint filed by the plaintiff, C. D. Di Giambattista, in the above-entitled action. In the alternative, defendant moves, pursuant to Fed. R. Civ. P. 56 for summary judgment.

The reasons for this motion are set forth in the attached memorandum.

Allowed. Donald S. Nelson, J.
April 21, 1988.

RECORD APPENDIX "F"

Judgment in a Civil Case

United States District Court

District of Massachusetts

in

C. D. DI GIAMBATTISTA,

Plaintiff

v.

JEREMIAH J. SULLIVAN, J. AND REGISTRAR OF DEEDS, MIDDLESEX COUNTY,

Defendants

No. 87-2562-N

In accordance with the Court's allowance of the defendants' motion to dismiss on April 21, 1988, judgment is entered for the defendants, Jeremiah J. Sullivan and Middlesex County Registrar of Deeds, John Zamparelli.

Robert J. Smith, Jr., Clerk

April 26, 1988.

RECORD APPENDIX "G"

Judgment

United States Court of Appeals

for the First Circuit

in

C. D. DI GIAMBATTISTA,

Plaintiff, Appellant

v.

JEREMIAH J. SULLIVAN, ET AL.,

Defendants, Appellees

No. 88-1550

This cause came on to be submitted on the briefs and original papers on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Entered February 2, 1989.

RECORD APPENDIX "H"

ORDER

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

in

C. D. DI GIAMBATTISTA,

Plaintiff, Appellant

v.

JEREMIAH J. SULLIVAN, ET AL.,

Defendants, Appellees

No. 88-1550

The petition for rehearing is denied. We only note in this context that appellant's motion to amend would not have cured the jurisdictional defects inherent in his complaint. We also deny appellant's motion in derogation of costs.

Francis P. Scigliano, Clerk

Entered March 28, 1989.

RECORD APPENDIX "I"

ORDER

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

in

C. D. DI GIAMBATTISTA,

Plaintiff, Appellant

v.

JEREMIAH J. SULLIVAN, ET AL.,

Defendants, Appellees

No. 88-1550

The motion of appellant to recall mandate is denied.

Francis P. Scigliano, Clerk

Entered April 25, 1989.

RECORD APPENDIX "J"

ORIGINAL COMPLAINT

UNITED STATES DISTRICT COURT

FOR MASSACHUSETTS

in

C. D. DI GIAMBATTISTA,

Plaintiff Pro Se

v.

JEREMIAH J. SULLIVAN, J.

AND REGISTRAR OF DEEDS, MIDDLESEX COUNTY,

Defendants

No. 87-2562-N

COMPLAINT FOR DEPRIVATION OF RIGHTS IN REAL PROPERTY WITHOUT PROCEDURAL DUE PROCESS

1. This proceeding is brought under 42 U.S.C. § 1983, 42 U.S.C. § 1988 and U.S.C.A. Const. Amend. 14, due process clause.

Jurisdiction, Venue and Parties

2. The United States District Court for the District of Massachusetts has jurisdiction

pursuant to 28 U.S.C. § 1331.

3. Plaintiff exercises his right pursuant to 42 U.S.C. § 1983 to bring this action free of requirements of exhaustion of state judicial or administrative remedies.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

5. Plaintiff C. D. Di Giambattista, a citizen of the United States, is a resident of Texas and Massachusetts.

6. The defendant Jeremiah J. Sullivan is a duly appointed recall justice of the Middlesex Probate and Family Court of Massachusetts.

7. The defendant Middlesex County Registrar of Deeds is a duly elected county official.

REQUEST FOR ORDERS TO VACATE AND ANNUL AN EX PARTE WRIT OF ATTACHMENT AGAINST REAL

RECORD APPENDIX "J"

PROPERTY AND TO STRIKE RECORDATION FROM THE DEED RECORDS

8. On May 4, 1987 while acting in his official capacity as a justice of the probate court, the defendant Jeremiah J. Sullivan without notice to plaintiff and without opportunity for hearing issued an ex parte writ of attachment against the real property of plaintiff C. D. Di Giambattista in the city of Everett, Massachusetts in the amount of $75,000.

9.As sole evidentiary standard for ex parte attachment pursuant to state rules 4.1(f) and 4.1(h) M.R.C.P. albeit without provision for due procedural process, the defendant justice accepted the affidavit of one, an attorney, whom he knew to be a convicted and imprisoned felon, whose testimony is impeachable

within statutory limits of time, who had shown himself to be disobedient, untrustworthy and dishonorable before the court, and under the influence of drugs.

10. The defendant justice thereby willfully and knowingly deprived the plaintiff of his constitutional rights in property both without procedural due process and upon tainted evidence falsely sworn.

11. In sum the defendant justice effectively set it out as law in Massachusetts that persons shall be deprived of their constitutional rights in real property without notice or opportunity for hearing, upon the impeachable testimony of a felon given ex parte, and with no more.

12. With his property rights delivered into such hands, plaintiff's interests are in

danger of irreparable harm, if not damage [sic] already accomplished.

13. On or about May 5, 1987 the Middlesex County Registrar of Deeds accepted and recorded the attachment for all the world to find and read.

14.On May 11, 1987 the Deputy Sheriff of Middlesex County mailed to plaintiff a notice that an attachment against his property had been recorded in the deed records.

15. Upon receipt of said notice on May 14, 1987 plaintiff had his first knowledge of any of the foregoing proceedings.

16. Plaintiff's motion pro se in Middlesex Probate Court on May 28, 1987 to dissolve the attachment was denied.

17. Plaintiff's petition pro se to a single

justice of the state Appeals Court for review and dissolution of the attachment was denied without prejudice July 8, 1987.[1]

18. Plaintiff took appeal therefrom to a panel of the state Appeals Court on August 3,

---

1. More accurately, the single justice pretermitted any decision on ex parte attachment until the appellant should bring forward on appeal all of the complex probate matters. The order of the single justice reads in full:

> "The prayers of the petition are denied without a hearing, as matter of discretion, and without prejudice to any rights petitioner may have under the provisions of G.L.c. 215, §9, as most recently amended."

The recommendation was not disinterested. On much more evidence than appears in the record here, the state courts, working in a judicial atmosphere of high political infusion, are reluctant to deal openly with review of ex parte attachment, a practice freely indulged fourteen years after its enjoinment by a three-judge federal district court.

[This note, June 4, 1989, is not part of the original complaint.]

1987. That appeal has not been entered [sic] as of the date below.[1]

WHEREFORE, the plaintiff demands from this Court judgment as follows:

1. That this Court order the ex parte writ of attachment annulled, dissolved and vacated.

2. That this Court order the Middlesex County

---

1. This second appeal, to a panel of the state appeals court was filed ["entered"] November 24, 1987. It was dismissed June 15, 1988 on the ground of lack of appellate jurisdiction because "the single justice's order is interlocutory and not appealable." Under well known case law, the rationale did not wash; and a case cited by the panel against the appellant worked, on reverse fact for him.

The only predictability, on the famous principle of Justice Holmes, was that the forbidden question, ex parte attachment in defiance of the federal injunction, was not to be tolerated as a visible issue. A petition for rehearing likewise was denied.

[This note, June 4, 1989, is not part of the original complaint.]

Registrar of Deeds to strike recordation of said attachment from the deed records.

3. That this Court issue declarative and injunctive orders enjoining the defendant justice Jeremiah J. Sullivan from further issuance of any other attachments against real property without due procedural process as required by federal law.

4. That pursuant to 42 U.S.C. §1988 this Court order the defendant justice to pay plaintiff the costs, expenses and reasonable fees of proceedings in this matter in the state probate and appeals courts and in the United States District Court, such fees being those he would reasonably have paid for attorneys fees had plaintiff engaged counsel.

5. That this Court order the defendant justice Jeremiah J. Sullivan to pay the

plaintiff exemplary damages commensurate with $75,000, the amount of attachment which the defendant justice ordered contrary to law; and commensurate also with the defendant's willful and knowing misapplication of law while acting under color of a judiciary [sic] capacity.

C. D. Di Giambattista

Plaintiff Pro Se

October 20, 1987

RECORD APPENDIX "K"

MOTION [DENIED]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

in

C. D. DI GIAMBATTISTA

Plaintiff, Appellant

v.

RECORD APPENDIX "K"

JEREMIAH J. SULLIVAN, ET AL.,

Defendants, Appellees

No. 88-1550

MOTION OF APPELLANT FOR RECALL OF MANDATE

In appeal from denial by the district court of leave to amend, and from dismissal of appellant's complaint under 42 U.S.C. §§ 1983, 1988, this court affirmed; and on March 28, 1989 this court denied appellant's petition for rehearing, noting 'inherent jurisdictional defects' in his complaint. Mandate issued April 5, 1989.

Upon further review of extensive applicable law since Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) and the particular facts of his case, appellant believes that another district court would have taken jurisdiction, the 'inherent defect' herein being resistance to caseload.

RECORD APPENDIX "K"

Appellant accordingly moves this court to recall its mandate pending application for writ of certiorari to the Supreme Court.

Denied April 25, 1989.

RECORD APPENDIX "L"

TRANSCRIPT

MIDDLESEX COUNTY PROBATE AND FAMILY COURT

HEARING BEFORE JEREMIAH SULLIVAN, J.

DECEMBER 11, 1986

in

PAULINE M. JOHNSON ET AL.,

Plaintiffs

v.

C. D. DI GIAMBATTISTA,

Defendant

No. 84-P0619-T1

No. 84-P0619-E2

No. 85-E0116-G1

No. 85-2295 SUPERIOR COURT

MR. CROWLEY: Just for the Court's information as well as brother counsel on this matter, last Saturday morning, I met with Mr. Delory and Carmin [sic] Di Giambattista at the Everett Cooperative Bank, where we effectuated the transfer of funds originally

held in Carmin's [sic] name to my name as administrator d.b.n. The funds in this account, in that account, were in the amount of $30,546.35. It will be from these funds that I will make disbursements to Anne White in the amount of $2,000, Richard Liebman in the amount of $2,000, and Charles Poole in the amount of $500.

THE COURT, JEREMIAH J. SULLIVAN, J.:
I think you ought to get a letter from Anne White, too, similar to what they consented to, okay? All right.

COPLEY COURT REPORTING
MELANIE L. GIAMARCO, C.S.R.
CERTIFIED JANUARY 23, 1987.

RECORD APPENDIX "M"

IN THE ISSUE OF PROBABLE CAUSE

Rule 4.1(f),(h) M.R.C.P.

WITHDRAWAL must be presented by the account owner in person or by mail.

ACCOUNT NUMBER 24-7619-60 Dec. 6 19 86

Thirty Thousand Five Hundred Forty-six 109 Dollars $ 30,546

DEDUCT ABOVE SUM FROM MY ACCOUNT ON DEPOSIT WITH

Everett Co-operative Bank

WITHDRAWAL Giambattista

:211370273:

Payable to the Estate of Theresa DiGiambattista
William F Crawley, Administrator
D.B.N

BEST AVAILABLE COPY